

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Revocation
of the Family Day Care License
of Scody Oesterich

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on October 6, 1999, at the Olmsted County Attorney's Office in Rochester, Minnesota. The record closed on December 1, 1999, upon receipt of the parties' last post-hearing submission.

Geoffrey A. Hjerleid, Assistant County Attorney, Office of the Olmsted County Attorney, 151 Fourth Street S.E., Rochester, Minnesota 55904, appeared on behalf of Olmsted County and the Minnesota Department of Human Services. The Licensee, Scody Oesterich, 1748 Second Avenue S.E., Rochester, Minnesota 55904, appeared on her own behalf, without benefit of counsel.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Human Services will make the final decision after a review of the record and may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Parties should contact Jerry Kerber, Director, Licensing Division, Minnesota Department of Human Services, 444 Lafayette Road, St. Paul, Minnesota 55155; telephone 612/296-4473, for further information about the filing of exceptions and the presentation of argument.

STATEMENT OF ISSUES

The issue in this case is whether the Licensee's license to provide family day care should be revoked based upon alleged violations of the day care licensing statute and rules involving: (1) the use of substitute caregivers without completion of the required background studies, in violation of Minn. Stat. § 245A.04, subd. 3(c)(3); (2) the failure to

appropriately supervise the children in care, in violation of Minn. R. 9502.0315, subp. 29a; (3) having combustible items within 36 inches of the furnace or heating sources and permitting children to have access to construction areas around the residence, in violation of Minn. R. 9502.0425, subps. 7 and 14; (4) having toxic substances accessible to children, not having proper vaccination records for pets, not having a test for chlamydia psittaci for birds in her home, performing a procedure on puppies on her kitchen floor with day care children present, and exceeding the maximum hot water temperature, in violation of Minn. R. 9502.0435, subps. 1, 4, 12(C), and 15(A); and (5) not having the required records for children in care, in violation of Minn. R. 9502.0405, subp. 4(A), (B), and (C).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Licensee, Scody Oesterich, has been a licensed day care provider in County since approximately January 19, 1995. She is currently licensed as a C2 Group Family Day Care with a maximum capacity of 12, with one adult caregiver.^[1] The Licensee also breeds and sells Chow Chow dogs as a hobby.

2. A Correction Order was issued to the Licensee in late 1994. The Correction Order noted that sterile compresses, tape, scissors, and first aid manual were needed for the first aid kit; sharp knives stored in the kitchen drawer must be inaccessible to children; the hot water was 130 degrees and had to be 120 degrees or less; the 911 and poison control numbers must be posted; an escape plan must be posted; the smoke detector in the upstairs hallway must be functional; toxic items such as deodorant stored in the bathroom medicine cabinet must be inaccessible; firearms and ammunition must be stored in separate rooms; all combustibles must be stored 36 inches from the furnace; and the Licensee must complete her provider policies. The Licensee returned the Correction Order to the County on or about December 30, 1994, and indicated that each item had been corrected.^[2]

3. A Correction Order was issued to the Licensee on approximately December 14, 1995, by Michelle Freiderich, the County licensing worker who was then assigned to the Licensee's day care. The Correction Order noted that a battery was needed for the Licensee's radio; a gate was needed for the stairwell when children between the ages of 6 months and 18 months were present; a philodendron plant, hairsprays, creams, and other toxins in medicine cabinet and hall cabinet must be inaccessible to the children; all combustibles must be stored 36 inches from the furnace; updated immunization records were needed for two children; and consent forms were needed for three substitutes. The Licensee returned the Correction Order to the County on or about December 30, 1995, and indicated that each item had been corrected.^[3]

4. Ms. Freiderich conducted a drop-in mid-year visit on July 30, 1996. The Licensee was found to be in compliance with day care rules with respect to the numbers and ages of children in care. The Licensee was told to have proof that her birds had

been tested for chlamydia psittaci available at the time of the relicensing visit in December. No Correction Orders were issued relating to this visit.^[4]

5. A Correction Order was issued to the Licensee by Ms. Freiderich on approximately October 4, 1996. The Order indicated that the Licensee had not submitted a consent for a background check on a substitute caregiver named Teri Wilttrout. The Licensee returned the form on approximately October 10, 1996, and indicated that she had Ms. Wilttrout sign the consent form.^[5]

6. On October 4, 1996, a parent who arrived at the Licensee's home at approximately 11:30 p.m. found that her five-year-old child and the Licensee's three children were home alone. She told the County that the Licensee was gone for at least 15 minutes. The Licensee said that she had gone to the Kwik Trip for Tylenol and had only been gone five minutes. She also said that a neighbor was watching her home for any lights and for the parent's arrival. After investigation, the County determined that the alleged incident did occur, and recommended that the Licensee's family day care license be suspended for one week, then placed on probationary status for one year.^[6] A Correction Order relating to this incident was issued to the Licensee by Ms. Freiderich on or about November 8, 1996. The Order noted the following violations: the provider's children and a day care child were left alone in the house while the provider went to a store for medication; and the front door (which provides a second escape from the living room, kitchen, etc) was not able to be easily opened. The Licensee returned the Correction Order to the County on or about December 1, 1996, and indicated that she had installed a new front door and that her neighbor would be physically present within the home should the Licensee "travel 4 blks. again" in the future.^[7]

7. A Correction Order was issued to the Licensee by Ms. Freiderich on or about December 12, 1996. In the Order, the following violations were noted: a battery operated flashlight was needed for storms; results of the test for chlamydia psittaci for the birds must be sent; consent forms were needed for three substitutes (the current background checks expired February 1997); drapery and blind cords must be inaccessible to the children; medicines stored in an upper kitchen cupboard must be inaccessible; the philodendron plant hanging in one corner of the living room must be inaccessible; bird seed on the floor in the bedroom must be inaccessible; immunization records for three children needed to be updated or completed; admissions and emergency forms for two children needed to be completed; and permission forms needed to be completed for one child. The Licensee returned the Correction Order to the County on or about January 21, 1997, indicating that these items had been corrected.^[8]

8. By letter dated December 13, 1996, the Licensee was notified that her license was being placed on probation for one year. The probationary action was based on the October 4, 1996, incident referenced in Finding No. 6 above. The letter indicated that this complaint was investigated by Rochester Police and Olmsted County Child Protection and the incident was substantiated as child neglect. The Department's December 13 letter stated that, "[d]ue to the seriousness of this violation which put the health and safety of children at risk, your license to provide family day care is being

placed on probationary status for a period of one (1) year.” Various conditions were imposed on the Licensee, including the need to “follow and comply with all parts of Minnesota Rules, parts 9502.0300 to 9502.0445.”^[9] There is no evidence in this record that the Licensee appealed the probationary order.

9. Ms. Freiderich dropped in at the Licensee’s home on March 25, 1997. The Licensee was found to be in compliance with respect to the numbers and ages of children in care. The Licensee had purchased three new puppies, but they were all too young to have received the rabies vaccination. No Correction Orders were issued stemming from this visit.^[10]

10. When Ms. Freiderich visited the Licensee’s home on June 5, 1997, she noticed that there were extension cords lying on the ground in the back yard, where the Licensee’s husband was in the process of completing a deck on the back of the house and putting up a garage. The Licensee’s husband was outside working with equipment and the extension cords at the time. Ms. Freiderich also noticed a manual lawn mower in the front yard, although no children were playing in the front yard.^[11] A Correction Order was issued to the Licensee on approximately June 11, 1997, indicating that the manual lawn mower on the front lawn and the extension cords in the back and side yards must be inaccessible to the children. The Licensee returned the Order to the County on or about June 11, 1997, indicating that the lawn mower had been put in the storage shed and no extension cords were out.^[12]

11. A drop-in visit and complaint investigation was conducted by Ms. Freiderich at the Licensee’s day care home on July 28, 1997. The Licensee was in compliance with the numbers and ages of children in care. The Licensee had purchased a large trampoline, and was told that she must obtain written permission from the parents for their children to use the trampoline. The Licensee admitted that children helped pick up boards and nails from the remodeling of their home and place them in a wheelbarrow. Ms. Freiderich told the Licensee that the day care rules prohibit children from being around construction areas. She also told the Licensee that an adult should be outside with the children until the construction was complete. The Licensee told the licensing worker that they keep the yard picked up so no one gets hurt and children were kept away from the garage and the truck where tools were stored.^[13] A Correction Order was issued to the Licensee on approximately July 28, 1997. The Order indicated that day care children helped to move boards, nails, etc. to wheelbarrows after siding was removed from her home. The Licensee returned the Order to the County on or about July 29, 1997, indicating that children would not be allowed to help and would be kept away from on-going construction, and that construction rubbish, tools, etc. would be picked up daily.^[14]

12. On July 30, 1997, the Licensee called Ms. Freiderich and told her that she had learned from Animal Control that her horse did need a rabies shot, and she had taken the horse in for the shot. Ms. Freiderich told the Licensee to send a copy of the rabies certificate to the County with her next attendance record.^[15]

13. The County received a complaint on September 8, 1997, alleging that the Licensee was not home when three school aged children (two in third grade and one in first grade) arrived at her home after school on September 5, 1997. The Licensee arrived home five to ten minutes later with a number of children. The Licensee told Ms. Freiderich that she was late in returning home from picking up her son at school that day because of construction on Highway 52. The Licensee also said that her husband was inside the house sleeping on the day in question, and would have answered the door if the children had knocked. Jill Mehrkens, an adult neighbor of the Licensee's, saw the children get off the bus and remained with the children until the Licensee arrived.^[16]

14. A drop-in and complaint visit was conducted on October 1, 1997. The Licensee was found to be in compliance with respect to numbers and ages of children in care. When Ms. Freiderich arrived, some of the children were outside. The garage door was open, giving the children access to chemicals. It was noted that the Licensee owned three Chow Chows (Buster, Enu, and Witness), and that there were several Chow Chow puppies in an enclosed area in the front yard. The Licensee told Ms. Freiderich that the Chow Chows would be kept outside or in the laundry room if the weather was too hot. In addition, some miniature dachshunds were kenneled outside the home but would be kept in a crate inside the house during the winter, and the Licensee's husband had a dog named Lady that would be kept if she was a good hunting dog. The licensing worker told the Licensee that she needed to provide verification that the dog had received her rabies vaccination.^[17] A Correction Order was issued to the Licensee on approximately October 6, 1997. The Order indicated that the Licensee needed to submit verification of rabies vaccinations for two dogs and that toxins in the garage must be inaccessible to the children. The Licensee returned the Order to the County on or about October 6, 1997. In her response, the Licensee indicated that she was submitting one dog's vaccination records with the form and would be submitting the other in the future, and stated that the large garage door would remain closed during day care hours.^[18] Lady died at some point prior to the Licensee's relicensing application on December 15, 1997.^[19]

15. On October 15, 1997, Ms. Freiderich issued a Correction Order to the Licensee finding a lack of supervision relating to the September 5, 1997, incident referenced in Finding No. 13 above. The Licensee returned the form to the County on or about October 18, 1997, and indicated that the children had been instructed to knock loudly to wake up her husband, and given two alternative locations to go in the event no one was home at the Licensee's house.^[20]

16. On December 2, 1997, the parent of a day care child reported (among other things) that she arrived on November 24, 1997, as three day children got off the bus. The Licensee was not present and no one answered when she and the children knocked on the door. The Licensee drove up shortly thereafter. In a home visit with a County licensing worker on December 18, 1997, the Licensee admitted that she arrived home after the school age children. She was delayed in leaving to pick up her son because she had to wait for a parent to pick up a child. The Licensee told the licensing worker that her husband was inside the house, but had laid down after putting a day

care child down for a nap. The Licensee also told the licensing worker that her husband had starting picking up her son at school so that the Licensee could stay home with the day care children.^[21]

17. On December 18, 1997, Ms. Freiderich visited the Licensee's day care residence. The Licensee requested that she receive a C3 license at that time. After discussion within the County, and based upon the fact that the Licensee had just completed a one-year probation and several complaints were received during that time frame, it was decided that the Licensee should be relicensed as a Class C1 license at that time and, if no further complaints were received within the next six months and the Licensee complied with day care rules, her license class would be changed to C3 on July 1, 1998.^[22] A Correction Order was issued to the Licensee the same day noting the following violations: a thermometer was needed for the first aid kit; the hot water was 135 degrees and should be 120 degrees or less; all combustibles must be stored 36 inches from the furnace; verification of rabies vaccinations was needed for two dogs and a miniature horse; immunization records were needed for ten children, and updated immunization records were needed for two children; emergency and permission forms were needed for one child; admissions, emergency, and permission forms were needed for four children. The Licensee was also reminded to submit a new consent form for Teri Wiltrout since her form had expired in November 1997. The Licensee returned the Correction Order form to the County on or about January 12, 1998, indicating that these items had been corrected.^[23]

18. On or about December 29, 1997, Ms. Freiderich issued a Correction Order to the Licensee finding a lack of supervision relating to the November 24, 1997, incident referenced in Finding No. 16. The Licensee returned the form on or about December 29, 1997, indicating that she had arranged alternative transportation for her child and would no longer need to travel with day care children.^[24]

19. On July 21, 1998, Patricia Heydon, the new licensing worker assigned to the Licensee, conducted a mid-year visit to the Licensee's home. The Licensee held a Class C3 license by the date of this visit.^[25] No Correction Orders were issued following this visit.

20. Ms. Heydon conducted a relicensing visit at the Licensee's day care residence on December 15, 1998. Because the Licensee no longer had an identified second caregiver, her license class was changed to a C2. Ms. Heydon found several violations during the visit. A Correction Order was issued to the Licensee on or about December 17, 1998.^[26] The Correction Order indicated that the water temperature tested at 130 degrees and must be 120 degrees or less; emergency numbers must be posted by the phone and the emergency escape plan must be reported; proof of current vaccinations must be provided for all pets requiring such; consent forms must be completed for all substitute caregivers and helpers ages 13 and over; various forms had to be updated or completed for more than twelve children; and proof of current CPR certification was required. The Licensee had her substitute caregivers complete the consent forms and mailed them back to the County around Christmas of 1998, along

with the completed Correction Order form. Ms. Heydon did not receive these materials.^[27]

21. On January 20, 1999, a complaint was received by the County relating to the Licensee's day care. The complainant alleged that the Licensee returned to bed after the complainant's child was dropped off in the early morning hours of January 15, 1999, and thus was left unsupervised; the meals served were not appropriate or nutritious; her child was on the trampoline unsupervised; and D.F., a 9-year-old day care child who was in fourth grade at the time, was left unsupervised for approximately 10-15 minutes on January 19. The complainant's child was almost five years old, and was dropped off between 5:00 and 6:30 a.m. The Licensee told the County licensing worker that, when children arrive in the early morning hours, she gets up to meet them and settles them on the couch, then returns to bed until the entire family gets up at 7:20 a.m. The Licensee's bedroom door is only four feet away from this couch. She denied feeding the day care children the food that was described and said that the child in question was not on the trampoline on the day in question, but indicated that her practice was to let school age children use the trampoline. The Licensee has had an agreement with D.F.'s mother since the beginning of the school year that D.F. could be at the house without her for a short period of time (approximately 10 to 15 minutes) while the Licensee was picking up her children from school. D.F. usually plays outside, but knows where the key to the house is and is able to let himself inside if necessary. D.F. comes to the Licensee's day care only because his parents do not think it would be a good idea for him to be at home with his two older brothers. The County determined that the Licensee left a child unsupervised when she went back to bed after the child was dropped off in the early morning on January 15, 1999, and that D.F. had been left unsupervised on January 19, 1999, when he arrived at the day care home after school and no one was present.^[28]

22. By letter dated February 9, 1999, Ms. Heydon provided materials to the Licensee relating to the use of a large trampoline, including an addendum that was to be given to the parents of day care children and permission slips that were to be filled out by parents.^[29] Pursuant to the Addendum signed by the Licensee, "[u]se of the trampoline will be supervised at all times by me or another adult caregiver," "[a] caregiver will be outside at all times when the children have access to the trampoline," and "[u]se of the trampoline will be limited to one child at a time."^[30]

23. On February 17, 1999, the County received a complaint regarding the Licensee's day care from an individual who owed the Licensee money for past day care services and had been told that the Licensee could no longer watch her child until she was up to date in her payments.^[31] The complainant alleged that someone who appeared to be under the age of 18 was watching approximately three children at the Licensee's home on February 16 when the complainant arrived at approximately 5:00 p.m. to pick up her child and the parent of another day care child was watching the children on February 17, 1999. The complainant also asserted that the Licensee's 6-year-old daughter changed her child's diaper and put on the diaper so loosely that the child's clothing became wet by the time they arrived home, and that the Licensee performed a caesarian section on one of her dogs on the kitchen floor in front of the day

care children during the fall of 1998. The Licensee told the County that the caregiver who was there late in the day on February 16 (Terry Wilttrout) had been the subject of a previous background study and was an adult although she looked young, and that a criminal background study form relating to the February 17 caregiver (Sheila Robertson) had been mailed in to the County by the Licensee. The Licensee denied having ever conducted a c-section on a dog, but said that she had “docked tails” and removed “dew claws” on puppies for a friend the previous fall on the kitchen floor. This procedure was performed at the end of the day, when several day care parents were present. The older day care children were allowed to watch if they wished, and the younger children were supervised by parents in a separate room. The County ultimately determined that the Licensee had used substitute caregivers on February 16 and 17 who had not been approved in advance by the County and that the Licensee had performed a procedure on puppies (docking tails and removing dew claws) that posed a health and safety risk to children. The County noted that “[t]he body fluids present a health hazard to the children in her care when these procedures are performed in a common area or in the kitchen where food is prepared” and that “the items used in these procedures (i.e. scalpel or nail clipper, needles for injections, lidocaine, etc.) pose a safety risk for the children if they are able to access them when she becomes involved with the puppies.”^[32]

24. During February 1999, Ms. Heydon informed the Licensee that she had not received the signed Correction Order or signed authorization forms from her substitute caregivers.^[33] On or about March 22, 1999, the Licensee again returned the December 17, 1998, Correction Order form to the County. On the form, the Licensee noted that she had turned down the water heater; re-posted the emergency numbers and escape plan; required five people to again fill out consent forms; had two animals re-vaccinated and would turn in a form on a third in the future; updated the forms of four children; several children had moved or were no longer in care; and she was enrolling in a CPR course. The Licensee also had her substitute caregivers fill out consent forms a second time and hand-delivered them to the County by approximately late March.^[34]

25. By letter dated April 23, 1999, the County recommended that the Department of Human Services order the revocation of the Licensee’s Group Family Day Care License. In the letter, the County set forth a series of licensing violations dating from 1996-99 that it had found to be substantiated and asserted that the Licensee had repeatedly received correction orders for items that posed a safety risk to children in her care. The County indicated that it did not feel that the Licensee could provide a safe environment to the children in her day care home.^[35]

26. The County notified the Licensee of its recommendation that her license be revoked in a letter dated April 27, 1999. In that letter, the County informed the Licensee that it had determined that the Licensee failed to provide appropriate supervision on two occasions (January 15 and 19, 1999) and had used substitute caregivers on two occasions (February 16 and 17, 1999) even though criminal background studies had not yet been completed regarding them. The County also concluded that the Licensee had performed a procedure on puppies on her kitchen floor that posed health and safety concerns to the children in her care. The letter indicated that, “[b]ased upon these

recent reports, as well as the history of complaints that this agency has received regarding your day care home, [the Licensee's licensing worker had] made a recommendation to the Department of Human Services that your day care license be revoked."^[36]

27. By letter dated June 18, 1999, the Department issued an Order of Revocation of the Licensee's child care license. The Order alleged that the Licensee had violated portions of the day care licensing statute and rules by: (a) using substitute caregivers without completion of the required background studies on February 16, 1999, and February 17, 1999, and previously on December 15, 1998, December 18, 1997, October 4, 1996, and December 14, 1995; (b) failing to appropriately supervise the children in care on January 15, 1999, and January 19, 1999 (and on a regular basis since the beginning of the school year), and previously on November 24, 1997, September 5, 1997, and October 4, 1996; (c) having combustible items within 36 inches of the furnace or heating sources on December 18, 1997, and December 14, 1995, having a lawn mower and extension cords in her yard accessible to children in June of 1997, and permitting children to walk through a construction area to reach the far backyard of her home in July of 1997;^[37] (d) having toxic substances accessible to children on October 3, 1997, December 12, 1996, and December 14, 1995, not having proper vaccination records for pets on December 15, 1998, December 18, 1997, and October 3, 1997, not having a test for chlamydia psittaci for birds in her home on December 12, 1996, performing a procedure on puppies on her kitchen floor with day care children present during the fall of 1998, and exceeding the maximum hot water temperature on December 15, 1998, and December 18, 1997; and (e) not having the required records for children in care as specified in Correction Orders issued on December 15, 1998, December 18, 1997, December 12, 1996, and December 14, 1995. The Department indicated that, "[d]ue to the chronic nature of the violations, Olmsted County cannot ensure minimum levels of care and safety of children in your care. Therefore, your license to provide family child care is being revoked."^[38]

28. The Licensee filed a timely appeal of the revocation.

29. On or about September 2, 1999, the State and County served the Licensee with a Notice of and Order for Hearing.

30. Ms. Heydon visited the Licensee's home on June 7, 1999. The Licensee told Ms. Heydon that she is sometimes in the house when the children were using the trampoline. Violations were noted, and a Correction Order was issued. Specifically, the Correction Order stated that there were no admissions and enrollment forms relating to three children that had been enrolled in the day care in May, 1999; dog feces were found next to the ladder to the trampoline; a boa constrictor and two sugar gliders were in the home and are not allowed under the day care rules; and children were not directly supervised when using the trampoline.^[39] The Licensee noted in response that she did have forms relating to the three new children but had given them to their parent to complete. Although one of the Licensee's dogs defecated by the trampoline while Ms. Heydon was visiting, the Licensee cleans up after her dogs each time they go out. The Licensee further noted that there were no sugar gliders in her home, but asserted that

the sugar gliders, snake, and tree frog had been previously approved by Ms. Freiderich. In addition, the Licensee indicated on the form that children only go out on the trampoline when their parent is present or the Licensee is out with them. She noted that only her own children and non-day-care friends were permitted to jump more than one at a time, and stated that the agency guidelines did not prohibit children from sitting on the mat while another child was jumping on the trampoline.^[40]

31. Because the Department of Human Services did not include the matters set forth in Finding No. 30 above in its Order of Revocation or seek to amend that Order to include those allegations, these allegations are not appropriately considered by the Administrative Law Judge in determining whether the Order for Revocation should be upheld.

33. Five letters were submitted by the Licensee from parents of children who have been in the Licensee's care.^[41] These statements expressed confidence in the Licensee's ability to provide day care and supported her continued day care licensure. These statements indicate that the parents believe that the Licensee is a competent, caring, and dedicated day care provider, and that the animals kept by the Licensee do not pose any danger to the children but instead provide valuable learning opportunities for the day care children. The letters also complimented the Licensee on the cleanliness of the day care home and her loving approach to the children in her care.

34. Any Finding of Fact more appropriately deemed a Conclusion of Law is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. Proper notice of the hearing was timely given and all relevant substantive and procedural requirements of statutes and rules have been fulfilled.

3. Pursuant to Minn. Stat. § 245A.08, subd. 3, the Commissioner has the burden of proof to demonstrate that reasonable cause existed for the revocation of the Licensee's family child care license. If such a showing is made, the burden of proof shifts to the Licensee to demonstrate by a preponderance of the evidence that she was in full compliance with the laws and rules that the Commissioner alleges were violated.

4. Minn. Stat. § 245A.04, subd. 3, states in pertinent part as follows:

Study of the applicant. (a) Before the commissioner issues a license, the commissioner shall conduct a study of the individuals specified in paragraph (c), clauses (1) to (5), according to rules of the commissioner. . . .

* * *

- (c) The applicant, license holder, the bureau of criminal apprehension, the commissioner of health and county agencies, after written notice to the individual who is the subject of the study, shall help with the study by giving the commissioner criminal conviction data and reports about the maltreatment of adults substantiated under section 626.557 and the maltreatment of minors in licensed programs substantiated under section 626.556. The individuals to be studied shall include:

* * *

- (3) current employees or contractors of the applicant who will have direct contact with persons served by the facility, agency, or program; . . .

5. The Commissioner has advanced evidence establishing reasonable cause to believe that the Licensee did not cooperate in obtaining criminal background studies prior to using substitute caregivers on February 16 and 17, 1999, in accordance with Minn. Stat. § 245A.04, subd. 3(c)(3). Accordingly, the burden shifted to the Licensee to demonstrate by a preponderance of the evidence that she is in full compliance with this day care statute. The Licensee demonstrated by a preponderance of the evidence that she mailed in consent forms to the County in December 1998, prior to the time that she used the substitutes in February 1999, but these forms apparently were never received by the County. The Licensee also demonstrated by a preponderance of the evidence that she cooperated in obtaining criminal background studies by re-submitting the consent forms in March 1999 after learning that the consent forms she had sent earlier had not been received. The Commissioner has not advanced evidence establishing reasonable cause to believe that the Licensee violated Minn. Stat. § 245A.04, subd. 3(c)(3), by failing to cooperate in obtaining criminal background studies prior to using substitute caregivers in December 1998, December 1997, October 1996, or December 1995. Although the Licensee needed to be reminded via correction order to submit background study consent forms for her substitutes in 1998, 1997, 1996, and 1995, there is no evidence that she failed to submit new consent forms in those years or that she used substitutes prior to the submission of the consent forms in those years. Moreover, Minn. Stat. § 245A.04, subd. 3(c)(3), merely requires that licensees “help with the study” by providing the Commissioner with criminal conviction data and maltreatment reports concerning individuals who will have direct contact with day care children; it does not require that the consent forms be submitted at any particular time. Accordingly, the Licensee demonstrated that she cooperated with the Commissioner in conducting background studies with respect to substitute caregivers, as required by Minn. Stat. § 245A.04, subd. 3.

6. Part 9502.0315, subpart 29a, of the Minnesota Rules defines “supervision” to mean “a caregiver being within sight or hearing of an infant, toddler, or preschooler at all times so that the caregiver is capable of intervening to protect the health and safety of

the child. For the school age child, it means a caregiver being available for assistance and care so that the child's health and safety is protected.”

7. The Commissioner has advanced evidence establishing reasonable cause to believe that the Licensee did not adequately supervise certain children in her care within the meaning of Minn. R. 9502.0315, subp. 29a, on January 19, 1999 (and earlier that school year), January 15, 1999, November 24, 1997, September 5, 1997, and October 4, 1996. Accordingly, the burden shifted to the Licensee to demonstrate by a preponderance of the evidence that she is in full compliance with this day care rule. The Licensee demonstrated by a preponderance of the evidence that she was within hearing of the four-year-old dropped off in the early morning hours of January 15, 1999, and was capable of intervening to protect that child's health and safety. She thus provided adequate supervision on January 15, 1999. The Licensee further demonstrated by a preponderance of the evidence that the parent of a day care child was present outside her home and the Licensee's husband was present inside her home on November 24, 1997, and a neighbor was present outside her home and her husband was present inside the home on September 5, 1997, when three school age children arrived home on their bus before the Licensee returned from picking up her son at his school. Because a caregiver (defined in Minn. R. 9502.0315, subp. 6 to include an adult) was in fact available for assistance and care and the health and safety of these children was protected, adequate supervision was provided on November 24, 1997, and September 5, 1997. The Licensee did not, however, demonstrate that she was in full compliance with the supervision rule on October 4, 1996, or on January 19, 1999 (or earlier during the 1998-99 school year) with respect to D.F.

8. Part 9502.0425, subpart 7(C) of the Minnesota Rules specifies that “[c]ombustible items must not be located within 36 inches of the furnace or other heating sources.” Subpart 14 of the same rule part provides that, “[d]uring construction or remodeling, children shall not have access to dangerous construction or remodeling areas within or around the residence.”

9. The Commissioner has advanced evidence establishing reasonable cause to believe that the Licensee had combustible items within 36 inches of the furnace in December 1997 and December 1995 and permitted her day care children to have access to construction areas around the residence in July 1997, in violation of Minn. R. 9502.0425, subps. 7 and 14. Accordingly, the burden shifted to the Licensee to demonstrate by a preponderance of the evidence that she was in full compliance with this day care rule. The Licensee did not demonstrate by a preponderance of the evidence that she was in full compliance with this rule provision on those occasions.

10. Part 9502.0435 of the Minnesota Rules sets forth sanitation and health requirements for day care providers. Subpart 1 requires that a licensee's residence “must be free from accumulations of dirt, rubbish, or peeling paint.” Subpart 4 specifies in pertinent part that “[a]ll medicines, chemicals, detergents, poisonous plants, alcoholic beverages, and other toxic substances must be inaccessible to children.” Subpart 12 requires that “[a]ll pets housed within the residence shall be maintained in good health and limited to dogs, cats, fish, guinea pigs, gerbils, rabbits, hamsters, rats, mice, and

birds if the birds are clear of chlamydia psittaci. The provider shall ensure that . . . rabies shots and tags are current for all dogs and cats" Finally, subpart 15(A) provides that the water temperature in sinks and tubs accessible to children "must not exceed 120 degrees Fahrenheit to prevent children from scalding themselves while washing."

11. The Commissioner has not advanced evidence establishing reasonable cause to believe that the Licensee violated Minn. R. 9502.0435, subp. 1, which requires that the residence must be free from accumulations of dirt, rubbish, or peeling paint, or that the Licensee violated Minn. R. 9502.0435, subp. 12(C), by failing to ensure that dogs were current in their rabies vaccination. The Commissioner has, however, advanced evidence establishing reasonable cause to believe that the Licensee violated Minn. R. 9502.0435, subp. 4, in December 1995, December 1996, and October 1997 by failing to ensure that all medicines, chemicals, detergents, poisonous plants, and other toxic substances were inaccessible to children. Furthermore, the Commissioner advanced evidence establishing reasonable cause to believe that the Licensee violated Minn. R. 9502.0435, subp. 15(A) in December 1997 and December 1998 by exceeding the maximum hot water temperature specified in the rule. Accordingly, the burden shifted to the Licensee to demonstrate by a preponderance of the evidence that she was in full compliance with these rule provisions. The Licensee did not demonstrate by a preponderance of the evidence that she was in full compliance with Minn. R. 9502.0435, subps. 4, 12(C), or 15(A) on these occasions.

12. The Commissioner has not advanced evidence establishing reasonable cause to believe that the Licensee violated Minn. R. 9502.0405, relating to sanitation and health requirements for day care providers, by performing a procedure on puppies on her kitchen floor with day care children present. In particular, the evidence did not establish reasonable cause to believe that the children had access to bodily fluids, sharp instruments, or medications, or that the procedure risked contamination to food products or otherwise posed a health hazard or a safety risk to children. Accordingly, the burden did not shift to the Licensee to demonstrate by a preponderance of the evidence that she is in full compliance with this rule provision with respect to this alleged violation.

13. Part 9502.0405 of the Minnesota Rules requires that certain records and forms be kept up to date and on file for each child in the provider's care, such as signed and completed admission and arrangements forms, special instructions from the parent, and immunization records.

14. The Commissioner has advanced evidence establishing reasonable cause to believe that the Licensee failed in December 1995, December 1996, December 1997, and December 1998 to obtain and keep up to date and on file for each child the information required by Minn. R. 9502.0405, subp. 4. Accordingly, the burden shifted to the Licensee to demonstrate by a preponderance of the evidence that she was in full violation with this rule provision. The Licensee did not demonstrate by a preponderance of the evidence that she was in full compliance with Minn. R. 9502.0405, subp. 4, on the dates in question.

15. Although the Licensee's violations may properly result in the imposition of disciplinary action against her license, it is recommended, for the reasons discussed in the Memorandum below, that license revocation not be imposed.

16. These Conclusions are reached for the reasons discussed in the Memorandum below, which is hereby incorporated by reference in these Conclusions.

17. Any Conclusion of Law which is more properly deemed a Finding of Fact is hereby adopted as such.

RECOMMENDATION

IT IS HEREBY RECOMMENDED:

That the Commissioner impose disciplinary action against the family day care license of Scody Oesterich.

Dated this 3rd day of January, 2000

BARBARA L. NEILSON
Administrative Law Judge

Reported: Tape recorded (3 tapes)

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The statute governing day care licensure requires that the "nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program" be considered when applying sanctions.^[42] It is evident that the Licensee has violated the day care licensing rules and governing statute on a number of occasions since her initial licensure. Although the Licensee's failure to fully comply with the statute and rules would provide a basis for revocation of her day care license, the Administrative Law Judge respectfully urges the Commissioner to consider the imposition of a sanction less severe than revocation under the particular circumstances of this case, such as suspension for a period of time

combined with a probationary period conditioned upon compliance with the rules and statute. This recommendation is made because of the existence of extenuating circumstances regarding some of the violations and because the violations that occurred after the Licensee's probation are not of sufficient severity to warrant revocation.

One of the main grounds raised by the Department and County as warranting revocation has to do with the Licensee's alleged failure to submit criminal background check consent forms for substitute caregivers prior to using them in mid-February 1999. The Licensee and Sheila Robertson (one of the substitutes) testified credibly that the consent forms for the criminal background check were completed and mailed into the County in December 1998 and a second time in February or March 1999, after the Licensee was notified by the County that the forms had not been received. In addition, the Licensee submitted a letter signed by Ramona Permann, another substitute used in February 1999, confirming that she also had filled out the background form for the Licensee in December 1998 and again a month or two later.^[43] Thus, the Licensee showed that she in fact had required the substitutes to complete the consent forms prior to using them as caregivers, consistent with the meaning of the statute. The Department and County did not disagree with the Licensee's expressed view that it was permissible to use substitutes pending completion of their background checks, as long as the forms had been submitted. There also was a misunderstanding on the part of the Licensee or a change of approach on the part of the County regarding when the consent forms were due, which contributed to her failure to have the consent forms completed prior to the relicensing visits in prior years. Moreover, there was no showing that the Licensee failed to provide consent forms in past years after being reminded to do so, or that she used substitutes in past years prior to having them complete background check consent forms, and thus no showing of a repeated violation by the Licensee. It is also significant that there was no evidence that any of the substitutes used by the Licensee in fact had any relevant criminal offenses. For these reasons, the Administrative Law Judge has concluded that the Licensee has shown by a preponderance of the evidence that she cooperated with the County and the Department in obtaining background consent forms.

The County and State further alleged that the Licensee did not adequately supervise certain children in her care within the meaning of Minn. R. 9502.0315, subp. 29a, on January 19, 1999 (and earlier that school year) and on January 15, 1999, and that she had earlier failed to adequately supervise children on November 24, 1997, September 5, 1997, and October 4, 1996. The Licensee did not demonstrate that she was in full compliance with the supervision rule on January 19, 1999 (or earlier during the 1998-99 school year) with respect to D.F. D.F. was nine years old at the time and in fourth grade. His mother sent him to the Licensee's after school rather than allowing him to go home without adult supervision only because he did not get along well with his older brothers. D.F.'s mother was aware that D.F. would be arriving at the Licensee's home 10-15 minutes before the Licensee returned and approved of the situation. D.F. was able to enter the Licensee's home with a key and knew phone numbers to reach his parents. It is doubtful that the mere ability of a child to reach an adult by telephone is sufficient to meet the requirement of the rule that a caregiver be "available for

assistance and care so that the child's health and safety is protected."^[44] Although providers are not permitted to enter into agreements with a child's parents to negate a requirement of the licensing rules, it is an extenuating circumstance that the child was nine years old and his mother agreed that he was sufficiently mature to handle the situation. In addition, another day care parent frequently arrived at the Licensee's home prior to the Licensee and thus was available to assist D.F. if necessary.^[45] The Licensee immediately discontinued this practice upon being issued a correction order and made arrangements to pick D.F. up at school.

With respect to the January 15, 1999, instance, the Licensee demonstrated by a preponderance of the evidence that she was within hearing of the four-year-old. This child was dropped off between 5:00 and 6:30 a.m. The Licensee greeted the child, then settled her on the couch and went back to bed until approximately 7:20 a.m., when the Licensee and the rest of her family got up. The Licensee's bedroom was only approximately four feet away from the couch where the child was lying. The Licensee was within hearing of the child and was capable of intervening to protect that child's health and safety. She thus provided adequate supervision on January 15, 1999. The licensing workers testifying at the hearing agreed that a day care provider who is providing 24-hour care should be allowed to sleep, and the approach taken by the Licensee seems reasonable.

The Licensee further demonstrated by a preponderance of the evidence that the parent of a day care child was present outside her home and the Licensee's husband was present inside her home on November 24, 1997, and a neighbor was present outside her home and her husband was present inside the home on September 5, 1997, when three school age children arrived home on their bus before the Licensee returned from picking up her son at his school. Because a caregiver (defined in Minn. R. 9502.0315, subp. 6 to include an adult) was in fact available for assistance and care and the health and safety of these children was protected, the Administrative Law Judge has concluded that adequate supervision was provided on November 24, 1997, and September 5, 1997.

It is evident that there was a failure to provide adequate supervision on October 4, 1996, when the Licensee left her children and a five-year-old day care child home alone for at least 15 minutes. Although the Licensee left to go to a convenience store to obtain Tylenol for her son who was running a high fever, this lack of supervision cannot be excused. The Licensee thus did not demonstrate that she was in full compliance with the supervision rule on October 4, 1996. However, the County and State decided that the imposition of probationary status on the Licensee's license was an appropriate sanction with respect to this and previous violations, and revocation would not properly be imposed on the basis of this 1996 incident.

The County and Department asserted that the Licensee has violated several provisions of the sanitation and health requirements for day care providers. The basis for the citation of Minn. R. 9502.0435, subpart 1, which requires a licensee's residence "must be free from accumulations of dirt, rubbish, or peeling paint" is unclear, since there was no documentary or testimonial evidence supporting the view that the

Licensee allowed such accumulations. The Licensee did not, however, dispute that she was found to have violated Minn. R. 9502.0435, subp. 4, in December 1995, December 1996, and October 1997 by failing to ensure that all medicines, chemicals, detergents, poisonous plants, and other toxic substances were inaccessible to children. There was evidence that, on one occasion, the latch on the Licensee's medicine chest broke during the inspection by the County licensing worker. It also is evident that the Licensee violated subpart 15(A) of Minn. R. 9502.0435 in December 1997 and December 1998 by exceeding the maximum hot water temperature specified in the rule. The Licensee testified that she had continually attempted to lower the temperature on the water heater to no avail. She purchased a new hot water heater in July 1999, which will make future violations less likely.

Although the Licensee did not have rabies and chlamydia certifications available for her dogs and birds at the time of her relicensing visits, this is not strictly required by the rule provisions cited by the Department in the Order for Revocation. There was no evidence that the Licensee failed to provide the certifications after being issued corrective orders, that rabies shots and tags were not current for her dogs, that her birds were not free of chlamydia psittaci, or that her pets otherwise were not "maintained in good health" as required by the rules. Ms. Freiderich agreed during cross examination that it appeared that the Licensee's dogs had in fact been properly vaccinated. The only possible exception was the Licensee's ex-husband's hunting dog. The Licensee merely testified, however, that she had not had this dog vaccinated. This dog apparently died shortly after the Licensee's husband obtained her, and it is not clear whether the dog had been vaccinated by a previous owner. The County and State did not provide evidence refuting the Licensee's assertion that it is not appropriate to vaccinate young puppies or females while they are being bred or are pregnant,^[46] and it would not be reasonable to interpret the rule provision to require vaccinations even when they are not deemed appropriate by a veterinarian. This was apparently recognized by the County in March 1997, when it did not issue a corrective order to the Licensee after she had purchased three new puppies who were too young to have received the rabies vaccination.^[47] Accordingly, no violation can be found with respect to the rabies issue.

The County and State alleged that the Licensee violated Minn. R. 9502.0405, relating to sanitation and health requirements for day care providers, by docking the tails of puppies and removing puppies' dew claws on her kitchen floor with day care children present. The evidence presented at the hearing did not establish reasonable cause to believe that the children had access to bodily fluids, sharp instruments, or medications, or that the procedure risked contamination to food products or otherwise posed a health hazard or a safety risk to children.^[48] The parent who initially complained to the County erroneously asserted that the Licensee had performed a caesarian section on a puppy and also had a potential bias against the Licensee, since the Licensee had refused to continue caring for the complainant's child unless she brought her child care payments up to date. There was no showing that the Licensee performed any procedure on a puppy "in the place where food is prepared" as County argues; the Licensee testified credibly that she used the kitchen floor at the end of a day and that she washes her floors with bleach. In addition, there was ample adult

supervision and younger day care children were kept in a separate room. Accordingly, the Licensee has not been shown to have violated this rule provision.

The County and Department have also asserted additional grounds for the revocation of the Licensee's license, including the Licensee's failure to ensure that combustible items not be located within 36 inches of the furnace, her failure to prevent access to construction areas around the residence, and her failure to comply with record-keeping requirements of the rules. The Licensee did not show full compliance with these rules. She admitted that items were within 36 inches of the furnace in December 1997 and December 1998, but testified that the items involved were merely Rubbermaid Christmas storage boxes. She also admitted that her day care children helped pick up boards with nails in July 1997. Although construction was on-going in her backyard in June 1997 and extension cords were available for use with construction equipment, the Licensee testified that her husband was present in the yard using this equipment and that the children's access thus was supervised. The County and State also advanced evidence establishing reasonable cause to believe that the Licensee failed in December 1995, December 1996, December 1997, and December 1998 to obtain and keep up-to-date and on file for each child the information required by the day care licensing rule. Although it appears that several of the children in question had moved or were otherwise no longer in care, the Licensee did not present evidence justifying her repeated failure to keep properly up-dated records or otherwise show that she was in full compliance with the record-keeping rule on the dates in question.

Compliance with all of these rule provisions is important to ensure the health and safety of day care children, the appropriate handling of emergencies, and the prompt notification of parents. The Licensee's failure to comply with these rules cannot be excused. If an additional probationary period is imposed, strict compliance with these and other provisions of the day care licensing rule should be required. The nature of these rule violations does not, however, warrant the revocation of the Licensee's day care license.

B.L.N.

^[1] Testimony of Licensee, Heydon; Ex. 37. Exhibits received in this matter will be referred to as "Ex. [number]." Attachments to exhibits will be referred to as "Ex. [number], Att. [letter]."

^[2] Ex. 4, Att. L.

^[3] Ex. 4, Att. K.

^[4] Ex. 27.

^[5] Ex. 4, Att. J.

^[6] Ex. 4, Att. 6.

^[7] Ex. 4, Att. I.

- [\[8\]](#) Ex. 4, Att. H.
- [\[9\]](#) Ex. 4, Att. M.
- [\[10\]](#) Ex. 29.
- [\[11\]](#) Ex. 30; Testimony of Freiderich.
- [\[12\]](#) Ex. 4, Att. G.
- [\[13\]](#) Ex. 32.
- [\[14\]](#) Ex. 4, Atts. 5 and F.
- [\[15\]](#) Ex. 31.
- [\[16\]](#) Ex. 4, Att. 4.
- [\[17\]](#) Ex. 33.
- [\[18\]](#) Ex. 4, Att. E.
- [\[19\]](#) Ex. 34.
- [\[20\]](#) Ex. 4, Att. D.
- [\[21\]](#) Ex. 4, Att. 3.
- [\[22\]](#) Ex. 35.
- [\[23\]](#) Ex. 4, Att. C.
- [\[24\]](#) Ex. 4, Att. B.
- [\[25\]](#) Testimony of Heydon, Freiderich, Licensee; Ex. 36.
- [\[26\]](#) Exs. 38, 40, and 4, Att. A.
- [\[27\]](#) Testimony of Licensee, Heydon and Sheila Robertson; Exs. 17, 21, 22, 23.
- [\[28\]](#) Testimony of Licensee, Fritz-Laue, Freiderich, Heydon; Ex. 4, Att. 2.
- [\[29\]](#) Exs. 41-43.
- [\[30\]](#) Ex. 44.
- [\[31\]](#) Exs. 17, 20, 23, and 4, att. 1, Testimony of Licensee, Robertson.
- [\[32\]](#) Ex. 4, Att. 1; Testimony of Licensee.
- [\[33\]](#) Testimony of Heydon.
- [\[34\]](#) Testimony of Licensee, Heydon, Ex. 4, Att. A.
- [\[35\]](#) Ex. 1.

^[36] Ex. 2.

^[37] The July 28, 1997, Correction Order issued by the County in reality cited the Licensee for allowing the day care children to help move “boards, nails, etc.” to wheelbarrows. Ex. 4, Att. F.

^[38] Ex. 3.

^[39] Exs. 45, 50.

^[40] Ex. 50; Testimony of Licensee.

^[41] Exs. 17-21.

^[42] Minn. Stat. § 245A.07, subd. 1.

^[43] Ex. 21.

^[44] The provisions relied upon by the Licensee at the hearing were not persuasive, since they focus upon the need for the provider and the parents to cooperate with respect to feeding, sleeping, and discipline, and have nothing to do with supervision of a child.

^[45] Testimony of Sheila Robertson.

^[46] In addition, the Licensee testified that she has never had to refrain from vaccinating a pregnant female in her care.

^[47] See Ex. 29.

^[48] A notarized letter from Ramona Permann states that the Licensee “had sanitary pads and towels laid down, and not one of the children were close enough to come into contact with the dog or ‘animal fluids’” and that three parents were present along with the Licensee. Ex. 21.